Bank Kerjasama Rakyat Malaysia v Zainul Rijal bin Abu Bakar & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (A)-1179–06 OF 2018
UMI KALTHUM, HASNAH HASHIM AND SURAYA OTHMAN JJCA
2 JULY 2020

Legal Profession — Disciplinary proceedings — Disciplinary Board/Committee — Disciplinary Committee ('DC') after investigations recommended no action on complaint against solicitor — DC found complaint did not amount to misconduct under s 94(3) of the Legal Profession Act 1976 ('the LPA') — Disciplinary Board ('DB') in letter to solicitor disagreed with DC's finding and recommendation and expressed view that solicitor's advice to client was a 'gross misrepresentation' — Whether DB breached s 103D(1) of the LPA in failing to record its reason for rejecting finding and recommendation of DC — Whether viewpoint expressed in DB's letter to solicitor was not a 'reason' envisaged by s 103D(1) — Whether 'gross misrepresentation' could not amount to misconduct under the LPA absent fraud, dishonesty or deceit on solicitor's part and might at best amount to mere negligence — Whether DB breached rules of natural justice, showed bias and prejudged solicitor's guilt even before hearing him — Whether DB's direction to solicitor to mitigate even before expressly finding him guilty showed DB's bias and prejudgment of issues

The appellant ('BKRM') had lodged a complaint with the Disciplinary Board ('the DB') under the Legal Profession Act 1976 ('the LPA') against its lawyer (the first respondent) over his alleged 'gross disregard' in protecting BKRM's interests in a loan transaction. BKRM had appointed the first respondent ('Zainul') to advise and do all things necessary to prepare and perfect the facility agreements and security documents in connection with its RM50m loan to a company ('the borrower'). As the borrower had, at the time, credit facilities with another bank ('Maybank') — which held debentures over the borrower's fixed and floating assets — Zainul sought Maybank's consent to create further securities over the borrower's assets in favour of BKRM including debentures over fixed and floating assets such as new plant, equipment and machinery. Upon receiving Maybank's consent, Zainul advised BKRM that the security documentation had complied with BKRM's requirements, that BKRM's interests were fully protected and that it could release the funds to the borrower. However, some years thereafter, Maybank and Maybank Islamic Bhd successfully applied to the High Court to declare, inter alia, that the charges that were created in their favour by the borrower over its assets took priority over those created by the borrower in BKRM's favour. Following from that decision, which was upheld on appeal, BKRM complained to the DB that

Zainul's failure to obtain Maybank's consent to exclude BKRM's securities from the debentures held by Maybank was a 'gross disregard' by him of its interests which had caused it substantial loss. The Disciplinary Committee ('DC') appointed by the DB to investigate the complaint, however, recommended that no action be taken against Zainul as his conduct did not amount to 'misconduct' under s 94(3) of the LPA but, at most, might amount to negligence. The DC found that BKRM did not allege any dishonesty, fraudulent conduct, defect in character or morally reprehensible conduct on Zainul's part which were necessary ingredients to constitute 'misconduct' under s 94(3). Pursuant to s 103D of the LPA, the DB disagreed with the DC's finding and recommendation, found Zainul guilty of misconduct under s 94(3)(n) of the LPA and fined him RM5,000. This was after the DB had sent Zainul a letter (even before hearing him) stating that it was 'of the view that the advice given (by Zainul to BKRM) was a gross misrepresentation of the consent given' by Maybank. The High Court allowed Zainul's appeal to set aside the DB's decision, agreeing that the DB had breached s 103D(1) of the LPA in not giving any reason for rejecting the DC's finding and recommendation. The court held that the view expressed by the DB in its letter to Zainul could not constitute a 'reason' as envisaged by s 103D(1) and it was, in any event, flawed because 'gross misrepresentation' could not amount to professional misconduct. The court also agreed with Zainul that there was bias and breach of the rules of natural justice on DB's part because it had pre-determined the complaint and found him guilty even before hearing him. The instant appeal by BKRM was against the High Court's decision.

Held, unanimously dismissing the appeal:

(1) With the amendment to s 103D(1) of the LPA which came into effect on 3 June 2014, the DB was mandatorily required to provide reasons if it rejected the DC's findings and recommendations. Given that the complaint against Zainul was lodged on 5 June 2015, the DB failed to comply with that requirement (see paras 41 & 45).

(2) The purported reason given by the DB in its letter dated 24 March 2017 to Zainul was just a mere view, a preliminary one at best. A view had to be premised on some reasons and explanations or, at the very least, a simple depiction of a thought-process of the DB as to how it arrived at such 'view'. A finding devoid of reason and explanation was no more than just a plain view. In the absence of reason, justification or elaboration to support such view, the mandatory requirement in s 103D(1) of the LPA had not been complied with. The DB's view/finding of gross misrepresentation could not be accepted as a finding of guilt of misconduct under s 94(3) of the LPA nor constitute the reason for the order that it made. The DB's reply dated 21 August 2017 to Zainul's solicitors who had asked for the reason for the rejection of the DC's finding and recommendation only amplified and confirmed the DB's

failure on this issue when it said '... the said provision does not require such reasons to be furnished to the parties' (see paras 44–45).

(3) There was a serious breach of natural justice when the DB failed to furnish the reason for its decision as required by law. The purported finding by the DB of 'gross misrepresentation' on Zainul's part was problematic for two reasons: (a) gross misrepresentation was within the scope of the law of tort and not within the ambit of the LPA since conduct amounting to mere negligence, however gross, was not professional misconduct; and (b) a finding of gross misrepresentation, even if it amounted to misconduct under the LPA, could not be adequately substantiated by the DB because the DB had failed to show the existence of the elements which embodied misconduct such as fraud, dishonesty or deceit, on Zainul's part (see paras 47–49).

(4) On the issue that the DB was biased and had predetermined Zainul's guilt, the High Court was right in finding that even after the DC had found no misconduct on Zainul's part, he was directed by the DB vide its letter of 16 May 2017 to make his representation before the DB on why liability should not be found against him. This letter was in addition to the DB's letter of 24 March 2017 where it had already made a finding of 'gross misrepresentation' even before it had heard Zainul. The act of one of the members of the DB in instructing Zainul's lawyer to submit on mitigation before making a finding of guilt served to show bias. The mitigation was proceeded with even after such instruction was questioned by Zainul's lawyer. This was a clear indication that the DB had pre-determined Zainul's guilt. Zainul's affidavit affirmed on 26 October 2017 had raised this very issue of bias but the DB had failed to rebut it (see paras 51–52).

[Bahasa Malaysia summary

Perayu ('BKRM') telah membuat satu aduan dengan Lembaga Disiplin ('LD') dibawah Akta Profesyen Undang-Undang ('APU') terhadap peguamnya (responden pertama) kerana tidak mengendahkan dalam melindungi kepentingan BKRM dalam transaksi pinjaman. BKRM telah melantik responden pertama ('Zainul') untuk menasihati dan membuat semua perkara yang perlu untuk menyediakan dan melengkapkan perjanjian fasiliti dan dokumen cagaran berkaitan dengan pinjaman RM50 juta kepada syarikat ('peminjam'). Memandangkan peminjam mempunyai, pada masa tersebut, fasiliti kredit dengan satu lagi bank ('Maybank') — yang memegang debentur terhadap asset tetap dan terapung — Zainul memohon izin Maybank untuk mewujudkan cagaran lanjut terhadap aset-aset peminjam seperti loji baru, alatan dan jentera. Selepas menerima izin BKRM, Zainul menasihati BKRM bahawa dokumen cagaran memenuhi keperluan BKRM, bahawa kepentingan BKRM dilindungi sepenuhnya dan ianya boleh mengeluarkan wang kepada peminjam. Namun, beberapa tahun kemudian, Maybank dan Maybank

Islamic Bhd telah berjaya memohon dengan Mahkamah Tinggi untuk mengisytiharkan, antaranya, cagaran yang diwujudkan yang memihak kepada mereka oleh peminjam terhadap aset miliknya mempunyai kepentingan apabila dibandingkan dengan aset yang diwujudkan oleh peminjam yang memihak kepada BKRM. Lanjutan keputusan tersebut, yang dikekalkan semasa rayuan, BKRM mengadu kepada LD bahawa kegagalan Zainul untuk mendapatkan izin Maybank untuk mengecualikan cagaran BKRM daripada debentur yang dipegang oleh Maybank merupakan satu pengabaian olehnya mengenai kepentingan BKRM yang telah menyebabkan BKRM mengalami kerugian yang besar. Jawatankuasa Disiplin ('JD') yang dilantik oleh LD untuk menyiasat aduan tersebut, memberi syor agar tiada tindakan diambil terhadap Zainul atas sebab perlakuannya tidak terjumlah kepada salah laku dibawah s 64(3) APU, tetapi mungkin terjumlah kepada kecuaian. JD mendapati bahawa BKRM tidak membuat apa-apa pengataan mengenai kecurangan, tindakan berasaskan frod, kecacatan dalam kelakuan atau kelakuan moral yang keji oleh Zainul yang merupakan inti pati untuk menunjukan salah laku dibawah s 94(3). Selaras dengan s 103D APU, LD tidak bersetuju dengan syor dan dapatan JD dan mendapati Zainul telah melakukan satu salah laku dibawah s 94(3)(n) APU dan menyamannya RM5,000. Ini adalah selepas DB telah menghantar Zainul satu surat (sebelum mendengar daripadanya) menyatakan bahawa ianya berkaitan dengan nasihak yang diberikan (oleh Zainul kepada BKRM) adalah satu gambaran yang salah berkaitan dengan izin yang diberikan oleh Maybank. Mahkamah membenarkan rayuan Zainul untuk mengetepikan keputusan LD, bersetuju bahawa LD telah melanggar s 103D(1) APU apabila tidak memberikan apa-apa alasan untuk menolak dapatan JD. Mahkamah memutuskan bahawa pandangan yang dikemukakan oleh LD dalam suratnya kepada Zainal tidak terjumlah sebagai alasan sepertimana diperuntukkan dalam s 103D(1) dan dalam apa keadaan sekalipun, cacat kerana memberi gambaran yang salah tidak terjumlah kepada salah laku profesional. Mahkamah juga bersejut dengan Zainul bahawa wujud bias dan pelanggaran prinsip keadilan asasi pada pihak LD kerana ianya telah membuat keputusan terhadap aduan tersebut dan mendapatinya bersalah sebelum mendengar daripadanya. Rayuan ini oleh BKRM adalah terhadap keputusan mahkamah tinggi.

Diputuskan, sebulat suara menolak rayuan:

(1) Dengan pindaan terhadap s 103D(1) APU yang berkuatkuasa mulai 3 Jun 2014, adalah mandatori agar LD memberikan alasan sekiranya ianya menolak dapatan dan syor JD. Mengambilkira aduan terhadap Zainul dibuat pada 5 Jun 2015, LD gagal untuk mematuhi keperluan tersebut (lihat perenggan 41 & 45).

(2) Alasan yang diberikan oleh LD dalam suratnya bertarikh 24 Mac 2017 kepada Zainul adalah satu pandangan awal. Satu pandangan haruslah berasaskan sebab dan ulasan atau, gambaran berkenaan dengan proses

pemikiran LD mengenai bagaimana ianya sampai kepada pandangan tersebut. Satu dapatan tanpa alasan dan penjelasan hanyalah pandangan kosong semata-mata. Dengan ketiadaan alasan, justifikasi atau ulasan untuk menyokong pandangan tersebut, keperluan mandatory dalam s 103D(1) APU tidak dipatuhi. Pandangan/dapatan LD mengenai pemberian gamabaran yang salah tidak boleh diterima sebagai dapatan mengenai salah laku dibawah s 94(3) APU dan tidak terjumlah sebagai alasan kepada perintah yang dibuat. Jawapan balas LD bertarikh 21 Ogos 2017 kepada peguam Zainul yang meminta alasan kepada penolakan dapatan JD hanya menunjukan dan mengesahkan kegagalan LD atas isu ini apabila ia mengatakan '... peruntukan tersebut tidak memerlukan agar alasan diberikan kepada pihak-pihak' (lihat perenggan 44–45).

(3) Wujud pelanggaran serius keadilan asas apabila LD gagal untuk mengemukakan alasan untuk keputusannya sepertimana diperuntukkan oleh Undang-Undang. Dapatan LD mengenai pemberian gambaran salah pada pihak Zainul adalah bermasalah untuk dua sebab: (a) pemberian gambaran salah adalah dibawah skop undang-undang tort dan tidak didalam bidangkuasa APU memandangkan kelakuan yang terjumlah kepada kecuaian bukanlah salah laku profesional; dan (b) dapatan pemberian gambaran yang salah, sekiranya ianya terjumlah kepada salah laku dibawah APU, tidak boleh disokong secara mencukupi oleh LD kerena LD gagal untuk menunjukan kewujudan inti pati yang memwujudkan salah laku seperti frod, niat curang atau penipuan di pihak Zainul (lihat perenggan 47–49).

(4) Atas isu bahawa LD adalah berat sebelah dan telah membuat keputusan akan kesalahan Zainul, Mahkamah Tinggi tidak terkhilaf apabila mendapati bahwa walaupun selepas JD mendapati bahawa tiada salah laku di pihak Zainul, dia diarahkan oleh lD melalui suratnya bertarikh 16 Mei 2017 untuk membuat representasinya dihadapan LD berkenaan mengapa liabilti tidak harus diletakkan keatasnya. Surat ini adalah lanjutan kepada surat LD bertarikh 24 Mac 2017 yang mana ianya telah membuat dapatan pemberian gambaran yang salah sebelum ia mendengar Zainul. Kelakuan ini adalah dariapda salah seorang LD dalam mengarahkan peguam Zainul untuk membuat hujahan mitigasi sebelum membuat dapatan salah menunjukan berat sebelah. Hujahan mitigasi tetapi diteruskan selepas arahan tersebut dipersoalkan oleh Peguam Zainul. Ini adalah indikasi jelas bahawa LD telah membuat keputusan atas kesalahan Zainul. Afidavit Zainul yang diikrarkan pada 26 Oktober 2017 menimbulkan isu berat sebelah ini namun LD gagal untuk mematahkannya (lihat perenggan 51–52).]

Cases referred to

An Advocate and Solicitor, In re [1950] 1 MLJ 113 (refd)
Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor [2017] 1 MLJ

596; [2017] 2 CLJ 493, FC (refd)
Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 10 CLJ 36, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3), (3)(n), 103(1), 103D, 103D(1), (3), (4)

Appeal from: Originating Summons No WA-17D-22–07 of 2017 (High Court, Kuala Lumpur)

Abdul Rashid bin Ismail (Azreen bt Ahmad Rastom with him) (Rashid Zulkifli) for the appellant.
Mohamad Haaziq Pillay (Manisha Sugunesegran with him) (JS Pillay & Mohd Haaziq) for the first respondent.
Mazura bt Mohd Amin (Mohanadass Partnership) for the second respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] The appellant in this appeal is a financial institution named Bank Kerjasama Rakyat Malaysia.

[2] The first respondent in this appeal is an advocate and solicitor of the High Court in Malaya.

[3] This appeal, which is one of two appeals, arose from the decision of the learned High Court judge vide Originating Summons No WA-17D-22–07 of 2017 dated 26 April 2018 which allowed the appeal by the first respondent to set aside the decision of the Disciplinary Board ('DB') of the Bar Council dated 17 June 2017 in finding that the first respondent was guilty of misconduct under s 94(3)(n) of the Legal Profession Act 1976 ('the LPA').

[4] Aggrieved with the aforesaid decision, the appellant herein filed an appeal to this court.

[5] The other appeal was filed by the Bar Council in Civil Appeal W-02(A) 1151–05 of 2018. When the two appeals were called up for hearing on 18 July 2019, this court was informed that the Bar Council had withdrawn its appeal. This court then gave the appellant's learned counsels the opportunity to seek further instructions from their client in light of the Bar Council's withdrawal of its appeal. However, on the instructions of the appellant at the next hearing date, this court heard fully the appellant's appeal with no participation, other

A than as a nominal second respondent, by the Bar Council.

[6] For the purpose of this appeal, the parties shall be referred to as they were at this court, that is, as the appellant and the first and second respondents respectively.

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BACKGROUND FACTS

[7] This appeal originated from a complaint lodged by the appellant against the first respondent on 4 June 2015 to the DB. The DB appointed a Disciplinary Committee ('DC') to investigate the complaint. The complaint was in respect of, inter alia, the first respondent's alleged gross disregard of his capacity as the advocate and solicitor for the appellant, to protect the appellant's interest in issuing a letter dated 18 March 2009 ('letter of release'). The appellant contended that the alleged gross disregard had caused the appellant losses in the sum of RM14,168,976.38.

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[8] The background facts of the complaint can be gleaned from the Disciplinary Committee Report dated 31 October 2016 ('the DC Report'). The DC Report stated that on 10 May 2008, a company by the name of Instyle Furniture Sdn Bhd ('the borrower') had applied for a financing facility from the appellant. The appellant then agreed to offer the borrower a financing facility in the sum of RM50m.

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[9] In order to facilitate the legal process of this financing facility, the appellant appointed the first respondent to advise, to prepare and to do the necessary in respect of the facility agreements and security documents.

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[10] It is also an undisputed fact between the parties that the borrower already had existing facilities with Malayan Banking Bhd ('Maybank') which had debentures created over the borrower's fixed and floating charges.

[11] On 12 January 2009, the first respondent wrote to Maybank to seek its consent for the appellant to create the following securities:

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(a) fixed first legal charge over four parcels of land in Muar, Johor;

(b) cash deposit by way of memorandum of deposit on Sijil Pelaburan Bank Rakyat ('SPBR') amounting to at least RM14.9m;

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(c) letter of set off on the SPBR;

(d) specific debentures covering fixed and floating charge over plant, equipment and machineries for particleboard to be financed by the appellant;

(e) deed of assignment of all rights, interests and benefits of designated accounts; and

(f) sinking fund of RM100,000 to be collected on a monthly basis from the date of the first disbursement up to RM3.7m.

[12] On 15 January 2009, Maybank informed the appellant that it had consented to the creation of specific debenture covering fixed and floating charge over the new plant, equipment and machineries for particleboard production to be financed by the appellant.

[13] On 18 March 2009, the first respondent, vide letter of even date ('the letter'), advised the appellant permitting the drawdown of the facilities which the appellant duly relied and acted upon. The letter stipulated that the security documents, specifically the memorandum of deposit dated 4 March 2009 in respect of cash deposited and charged by the borrower, had complied with the appellant's requirements and that the interest of the appellant as lender was fully protected.

[14] The letter formed the basis of the appellant's complaint to the DB. The appellant was of the view that the letter assured the appellant that the security documents, specifically the memorandum of deposit dated 4 March 2009 in respect of the cash deposited and charged by the borrower, had complied with the appellant's requirements. Thus, ensuring the appellant's interest was well protected.

[15] On the contrary, vide Originating Summons No 24NCC-68–02 of 2015, Maybank and Maybank Islamic Bhd filed a claim against the appellant seeking, inter alia, a declaration that the charges that were created by the borrower over its assets in favour of Maybank under the debentures in favour of Maybank which were subsequently vested in Maybank Islamic Bhd rank in priority to the security documents created by the borrower in favour of the appellant including the memorandum of deposit dated 4 March 2009.

[16] The learned High Court judge in Originating Summons No 24NCC-68–02 of 2015 held in favour of Maybank and Maybank Islamic Bhd and specifically, the learned High Court judge held that the Maybank and the Maybank Islamic Bhd's debentures had ranked in priority to the security documents created by the borrower in favour of the appellant including the cash deposits. The appellant appealed against this decision to this court and the appeal was dismissed on 2 June 2016.

[17] The basis of the appellant's complaint against the first respondent was that the first respondent had failed to obtain the consent from Maybank to

A exclude the appellant's securities from its debentures. At the hearing of the DC, the learned counsel for the first respondent argued that the alleged misconduct committed by the first respondent did not come under the purview of s 94(3) of the LPA. The alleged misconduct was at best a mere negligence and should not come under 'misconduct' as per s 94(3) of the LPA.

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[18] The learned counsel for the appellant on the other hand argued that the first respondent had wrongfully represented to the appellant and failed to protect the interest of the appellant. Thus, such failure would amount to 'gross disregard' of the appellant's interest under s 94(3) of the LPA.

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[19] However, based on the evidence before them, the DC found that the appellant's complaint against the first respondent did not satisfy the requirements under s 94(3) of the LPA to constitute 'misconduct' on the part of the first respondent.

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[20] The DC was of the view that the complaint lacked any allegation of dishonesty or fraudulent conduct by the first respondent, and there was also 'no allegation suggesting any defect in character or morally apprehensive conduct that is unfit as a solicitor by the first respondent', that formed part of the requirements under s 94(3) of the LPA.

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[21] In addition to that, the DC was also of the view that the alleged gross misconduct in the complaint might at its highest (but by no means constituting a finding by the DC) support a claim of negligence. As such, the complaint fell outside the purview of the DC since there is no misconduct as alleged in the said letter. The DC thenceforth recommended that no action be taken against the first respondent in respect of the complaint.

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[22] The DB, however, vide an order under s 103D of the LPA dated 17 June 2017 ('the order'), after giving the first respondent an opportunity to be heard, disagreed with the findings and recommendations of the DC. The DB then ordered the first respondent to pay a penalty of RM5,000, payable to the Discipline Fund within one month from the date of the order failing which the first respondent shall be suspended pursuant to s 103(1) of the LPA from practicing as an advocate and solicitor until payment of the penalty. It is to be noted that the DB, before making the order, had stated vide its letter dated 24 March 2017 to the first respondent (but before hearing the first respondent) that it 'was of the view that the advice given (by the first respondent to the appellant) was a gross misrepresentation of the consent given' by Maybank and gave notice to the first respondent to appear before the DB on the assigned date pursuant to ss 103D(3) and 103D(4) of the LPA.

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AT THE HIGH COURT

[23] Dissatisfied with the order made by the DB, the first respondent vide Originating Summons No WA-17D-22–07 of 2017 ('the High Court proceedings') (the basis of this present appeal) filed an appeal to set aside the order. The Bar Council was allowed to be the intervener in the High Court proceedings.

[24] The main contention of the first respondent was that the DB had rejected the DC's findings and recommendations of no action to be taken without providing any reasons and/or justifications at all. The first respondent submitted that such failure was contrary to s 103D(1) of the LPA.

[25] The appellant and the Bar Council, acting as the intervener, submitted that the DB was correct in its decision and that the DB was not bound by the findings and recommendations made by the DC.

[26] The learned High Court judge agreed with the submissions of the first respondent (the appellant at the High Court) and held that the DB's finding of guilt of misconduct under s 94(3) of the LPA and what purportedly constituted misconduct was not properly reasoned and explained by the DB.

[27] The learned High Court judge further found that the statement made by the DB in its letter dated 24 March 2017 purportedly stating the reason for its decision was not a proper reason as envisaged by s 103D(1) of the LPA. Failure to record reasons to support the decision of the DB was held to be in breach of s 103D(1) of the Act. Further, the DB's statement that the first respondent was guilty of gross misrepresentation was flawed because gross misrepresentation does not fall within the purview of professional misconduct. Instead it falls under the law of tort. The learned High Court further agreed with the first respondent's submission that there was no fairness at all from the DB because the DB had wanted to hear mitigation without first finding the first respondent guilty, which showed that the DB had pre-determined the complaint.

THE APPEAL

[28] Before us, the appellant submitted that the learned High Court judge had erred in setting aside the DB's decision and the appellant premised its arguments on the following grounds:

(a) the DB was correct to have found the first respondent guilty of misconduct;

(b) the DB had recorded and furnished the reasons to the first respondent in finding the first respondent guilty of misconduct; and

(c) there was no bias by the DB and it had acted in accordance with the applicable rules and procedures.

[29] The appellant argued that the first respondent had a duty of care to warn the appellant of foreseeable risks associated with the facilities and the securities to be created under the circumstances. The first respondent, as the solicitor retained in respect of this transaction, knew that the appellant would be relying on the first respondent to provide it with accurate and proper advice. Thus, the appellant submitted that the first respondent's advice was clearly a gross misrepresentation of the position taken by Maybank and the appellant's interests were not protected.

[30] Following that, the appellant submitted that the DB was correct in departing from the findings and recommendations of the DC. The appellant submitted that in doing so, the DB had clearly stated, in the DB's letter to the first respondent dated 24 March 2017 giving notice to the first respondent under ss 103D(3) and 103D(4) of the LPA, as follows:

> ... The Board disagreed with the finding and recommendation of the Disciplinary Committee on the complaint against you. The Board was of the view that the advice given was gross misrepresentation of the consent given by Malayan Banking Berhad.

[31] The appellant argued that this failure on the part of the first respondent fell within the scope of s 94(3)(n) of the LPA. The appellant further argued that there is no requirement that there must be deceit or dishonesty under the abovementioned provision and as such, the imposition of the requirement that there must be deceit or dishonesty before a finding of misconduct alluded to by the learned High Court judge is erroneous.

[32] The appellant emphasised in its submission that the finding of the learned High Court judge that the DB had breached s 103D(1) of the LPA when the DB purportedly failed to furnish reasons for departing from the findings and recommendations of the DC to be erroneous. The appellant submitted that the letter dated 24 March 2017 had furnished the reasons for the DB's decision.

[33] In respect of the issue of pre-determining the guilt and bias against the first respondent, the appellant submitted that all due rules and regulations had been complied with by the DB and the first respondent and his learned counsel had been given enough opportunity to submit before the DB on why the DB ought to follow the findings and recommendations of the DC and on

mitigation. The steps taken by the DB was consistent with s 103D(4) of the LPA.

[34] Further, it was also the contention of the appellant that the DB, as an administrative body, was entitled to prescribe the hearing process and was under no obligation to follow the rules and procedures of a court trial as long as the process and procedures subscribed to were fair, to which in this appeal it was submitted that the proceedings were fair.

[35] The appellant submitted that the learned High Court judge had erred in his findings when he decided that the DB was biased against the first respondent and when he, the learned judge, decided that the DB had pre-determined his guilt.

[36] Conversely, in contesting this appeal, the first respondent premised his arguments on the following grounds:

(a) there was a breach of natural justice on the part of the DB and/or a breach of s 103D(1) of the LPA when the DB failed to provide reasons for not following the findings and recommendations of the DC;

(b) gross misrepresentation is not within the scope of misconduct under the LPA but falls under the law of tort; and

(c) there was an element of biasness in respect of the DB's decision where the DB had already pre-determined a finding of guilt towards the first respondent.

[37] The first respondent submitted that the failure of the DB to furnish any reason in finding the guilt of the first respondent was a clear breach of natural justice. That the DB had already pre-determined to find the first respondent guilty as the DB had only wanted to hear mitigation without first finding the first respondent guilty.

OUR DECISION

[38] Section 103D(1) of the LPA provides as follows:

> 103D Consideration by the Disciplinary Board of the report of the Disciplinary Committee
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> (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board *shall record the reason for the rejection*. (Emphasis added.)

[39] The Federal Court in *Majlis Peguam Malaysia v Rajehgopal a/l Velu & Anor* [2017] 1 MLJ 596 at p 618; [2017] 2 CLJ 493 at pp 513–514 had dealt with s 103D(1) and stated as follows:

> [59] We agree that under the current provisions of s 103D(1) of the LPA, the DB shall record the reasons if it rejects the recommendation made by the DC. It is a mandatory requirement. However, it must be noted that the said requirement was only inserted into the section by an amendment to the LPA vide the Legal Profession (Amendment) Act 2012 (Act A1444) which came into effect on 3 June 2014 vide PU (B) 262/2014. There was no indication that the amendment was to take effect retrospectively.

[40] In addition to that, this court's decision in *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586 at p 601; [2017] 10 CLJ 36 at p 50, para 33, stated as follows:

> ... Section 103D has since been amended to require the DB to give reasons where it chooses not to follow the findings and recommendations of the disciplinary committee ...

[41] At this juncture, we must point out that two things are clear from the aforementioned line of authorities. First, it is a mandatory requirement for the DB to provide reason should it choose to depart from the DC's findings and recommendations. Second, the amendment to s 103D(1) is to take effect starting from 3 June 2014. In this appeal, the complaint against the first respondent was lodged on 5 June 2015 and thus, the applicability of this provision to this case was to our mind a non-issue.

[42] We had carefully examined the letter dated 24 March 2017 by the DB in departing from the decision of the DC and the relevant excerpt of the said letter is as follows:

> 1. We write to inform you that the Disciplinary Board has at its meeting held on 13 January 2017 considered the Report of the Disciplinary Committee on the complaint against you. The Board disagreed with the finding and recommendation of the Disciplinary Committee on the complaint against you. The Board was of the view that advice given was gross misrepresentation of the consent given by Malayan Banking Berhad.

[43] It is crystal clear to us that there is a mandatory requirement under s 103D(1) of the LPA for the DB to furnish reason to the first respondent should it choose to depart from the finding of the DC, which in this appeal purportedly they did. The next question is whether this requirement had been fulfilled by the DB?

[44] To assist us in answering this issue, we then directed our minds to a

letter dated 21 August 2017 by the DB that was sent to the first respondent's solicitors when the latter asked for the reason for the rejection of the DC's findings and recommendations. An important excerpt of the aforesaid letter is as follows:

> However, it is pertinent to note that the said provision does not require such reasons to be furnished to the parties.

[45] We were of the view that the DB had in fact failed to comply with the mandatory requirement of s 103D(1) of the LPA. We were also of the view that the purported reason provided by the DB in the letter dated 24 March 2017 was in fact a mere view, a preliminary one at best. To our minds, a view must be premised on some reasons and explanations or at the very least, a simple depiction of a thought-process of the DB as to how it arrived at such 'view'. We were mindful that a finding devoid of reason and explanation was in fact no more than just a plain view. In the total absence of reason, justification or elaboration to support such view, the mandatory requirement under s 103D(1) had not been complied with. Thus, the DB's view/finding of gross misrepresentation could not be accepted as a finding of guilt of misconduct under s 94(3) of the LPA nor constitute the reason for the order of the DB. The DB's letter dated 21 August 2017 only amplified and confirmed its failure on this issue.

[46] We therefore agreed with the learned High Court judge that there was no reason recorded for such rejection by the DB and such failure was a clear breach of s 103D(1) of the LPA.

[47] In addition, we were also mindful of the fact that there was a serious breach of natural justice when the DB failed to furnish reason for its decision as required by the law.

[48] Consequently, we were also of the view that the purported finding of the DB of gross misrepresentation by the first respondent was problematic based on two reasons. First, gross misrepresentation is within the scope of the law of tort. It does not however fall within the ambit of the LPA. We refer to *Cordery's Law Relating to Solicitors* by Graham J Graham Green (5th Ed, London Butterworths, 1961) at p 466 which states as follows:

> Again, conduct amounting to mere negligence, however gross, is not professional misconduct.

[49] Secondly, a finding of gross misrepresentation, even if it amounts to a misconduct under the LPA, could not be adequately substantiated by the DB because the DB had failed to show the existence of the elements which embody misconduct such as fraud, dishonesty or deceit by the first respondent. We refer

to the decision of *In re an Advocate and Solicitor* [1950] 1 MLJ 113 where it was held, at pp 115–116, that:

> ... In all the cases I have examined where what was involved was the solicitor's relations with his client and where the courts have held that professional misconduct has existed, there has been present some element of fraud, dishonesty or deceit. I can find no case where the simple failure to do work for which payment has been made or where neglect or even a refusal to pay money where there has been no question of fraud or misappropriation has been held to amount to professional misconduct ...

[50] What were the factors that the DB had taken into account in arriving at the finding of gross misrepresentation? The DC was specific in its findings and recommendations when it stated that there was 'no allegation of any defect in character or any morally apprehensive conduct that is unfit as a solicitor' against the first respondent. Thus, when the DB reversed and departed from such findings without any allegation raised towards that effect was questionable. In these circumstances, we were of the view that it would be highly indefensible to be in agreement with the finding of guilt of professional misconduct that not only exceeded the scope of the LPA but was not supported by any reason and/or justification whatsoever.

[51] On the issue of the biasness of the DB and on whether the DB had pre-determined the guilt of the first respondent, we were in agreement with the learned High Court judge that even after the findings and recommendations of no misconduct by the DC, the first respondent was directed to make his representations on why liability should not be found against him before the DB vide DB's letter dated 16 May 2017. This 16 May 2017 letter was in addition to the DB's letter dated 24 March 2017 referred to earlier where the DB had already made a finding of gross misrepresentation before even hearing the first respondent.

[52] In addition to that, we were also of the considered view that the act of one of the members of the DB in instructing the first respondent's solicitor to submit on mitigation before a finding of guilt served to show the biasness. The mitigation was proceeded with even after such instruction was queried by the first respondent's solicitor. To our minds, this was a clear indication that the DB had pre-determined the finding of guilt of the first respondent. The first respondent's affidavit affirmed on 26 October 2017 had raised this very issue and this allegation remained unrebutted as the DB had not filed any affidavit to the contrary to rebut the allegation of bias.

CONCLUSION

[53] Based on the reasons adumbrated above, we were of the unanimous view that the appeal be dismissed with no order as to costs. We were fortified in our decision by the fact that the Bar Council had earlier on withdrawn its appeal against the learned High Court judge's decision. We therefore saw no cogent reason to disturb the decision of the learned High Court judge. The deposit of this appeal was to be refunded, if any.

Appeal dismissed.

Reported by Ashok Kumar